(2)

No. 90-1977

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

JOHNNY DUPREE, *et al.*,

Appellants,

v.

MIKE MOORE, *et al.*,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Whether the potential impact of this case on other Voting Rights Act cases is significant enough to warrant further review?

Whether the district court was correct in holding that the enactment in question (§ 47 of the Mississippi Uniform School Law of 1986) was precleared under § 5 of the Voting Rights Act after the United States Attorney General failed to interpose any objection to any of the provisions of the Uniform School Law within sixty days of the State's submission, which clearly stated that the Act was being submitted "in its entirety"?

PARTIES TO THE PROCEEDING BELOW

The parties in the court below were:

Plaintiffs: Johnny Dupree, Jeff R. Bowman, Catherine Jones and Charlotte Tullos, individually and in their official capacities as members of the Board of Trustees of the Hattiesburg Public School District.

Defendants: Ray Mabus, in his capacity as Governor of Mississippi, Mike Moore, in his capacity as Attorney General of Mississippi, and the State of Mississippi.

Defendants/Intervenors: (1) Lamar County Board of Education and Trustees, in their official capacities. At the time the action was filed, the members of the Lamar County Board were Charles L. Cameron, Rita Downs, Tommy Graham, Fredie D. Howell and Dr. Johnny R. Purvis. Stephen High has replaced Rita Downs on the Board. (2) Forrest County School District and Members of its Board of Trustees, in their official capacities. The members of the Forrest County Board are Bobby Patrick, Frank Myers, Mike Gilpin, John E. Clark and W. Larry Thompson.

The Plaintiffs in the court below are the Appellants in this Court. The Appellees in this Court are the Defendants and the Defendants/Intervenors with the exception of Ray Mabus, Governor of Mississippi, who was dismissed by the District Court and is not a party to this appeal.

This Motion to Dismiss or Affirm is filed on behalf of Forrest County School District and the Members of the Board of Trustees, in their official capacities, and Mike

PARTIES TO THE PROCEEDING BELOW – Continued

Moore, in his capacity as Attorney General of Mississippi, and the State of Mississippi, only. The Lamar County Board of Education and Trustees in their official capacities are filing a separate motion.

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On Appeal From The United States District Court For The Southern District Of Mississippi

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6, the Appellees move to dismiss this appeal or, alternatively, to affirm the judgment of the three-judge court below. The motion is based on the grounds that (1) the regulations controlling this action have since been amended and this case's impact on current Voting Rights Act cases will be insignificant; (2) the lower court's ruling is based on very specific and restricted facts which are unique to the instant case and which will have no far-reaching implications on Voting Rights Act cases nationwide; and (3) the decision of the lower court is eminently correct so as to warrant no further review.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1973c

This statute is reprinted in App. M to Appellants' Jurisdictional Statement, 176a-177a.

28 C.F.R. § 51.25 (1986)

This regulation is reprinted in App. N to Appellants' Jurisdictional Statement, 178a-179a.

28 C.F.R. § 51.35 (1986)

This regulation is reprinted in App. O to Appellants' Jurisdictional Statement, 180a.

Miss. Code Ann. § 37-7-611 (1972)

This statute is reprinted in App. E to Appellants' Jurisdictional Statement, 107a-109a.

Miss. Code Ann. § 37-7-103 (1972 & Supp. 1990)

The two versions of this statute are set forth in App. D to Appellants' Jurisdictional Statement, 76a-77a.

STATEMENT OF THE FACTS

Before 1986, Mississippi law provided for the existence of several types of school districts. The method by which the district lines of a school district could be altered depended upon the type of school district

involved. For instance, Miss. Code Ann. § 37-7-611 (1972) provided that areas annexed by a municipality would automatically be merged into any municipal separate school district existing within the annexing municipality. In effect, § 37-7-611 provided for the "hostile takeover" of students and tax base as a result of a municipal annexation.[1] In 1977, Miss. Code Ann. § 21-1-59 was amended to provide an exception to § 37-7-611 by providing that any annexation of a municipality across county lines would not affect the school district in the annexed area unless such school district gave its consent for the annexed territory to be included in the municipal separate school district. In 1978, § 21-1-59 was again amended to extend the exception to situations in which a municipality was annexing *further* into a county other than its own county. The 1978 amendment also provided for referendums in specific situations.

In 1986, the Mississippi legislature enacted the Mississippi Uniform School Law of 1986 [hereinafter referred to as "Uniform School Law" or "the Act"],[2] which was, among other things, "an act to provide that all public school districts in the state of Mississippi shall have a

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[1] The potential adverse effect of this provision on county school districts surrounding municipal separate school districts is best demonstrated by the fact that the City of Hattiesburg, Mississippi, home of Appellants in this appeal, has annexed surrounding territory on six different occasions since 1966. These annexations occurred in 1966, 1979, 1981, 1982, 1985 and 1989. (See Appellants' Jurisdictional Statement, p. 3.)

[2] Senate Bill No. 2117, ch. 492, Laws of Mississippi, 1986 Regular Session.

common system of administration." Part of the uniformity resulting from the Act was the creation of one type of school district, as opposed to several, as well as the provision for one method by which school district lines could be altered. To make way for this uniformity, § 37-7-611, as well as 22 other statutes dealing specifically with the creation and operation of municipal school districts, was repealed by § 47 of the Uniform School Law.[3] Section 37-7-611, which had provided for the automatic merging, hostile or otherwise, of territory into a municipal separate school district upon annexation, was replaced by § 52 of the Act, which amended Miss. Code Ann. § 37-7-103 to provide for the single method by which any school district could change its boundaries. The amended Miss. Code Ann. § 37-7-103 provided that all school districts in Mississippi would have the same power to move district lines, but only with the consent of the school districts involved. It replaced all conflicting provisions regarding the movement of school district lines. No party contends that the amendment to § 37-7-103 (§ 52 of the Uniform School Law) was not properly submitted and precleared by the United States Attorney General [hereinafter "USAG"] under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

After the Uniform School Law was enacted and signed by the Governor, it was submitted in its entirety to the USAG for preclearance under § 5 of the Voting Rights Act on July 22, 1986. It was received by the U.S. Department of Justice on July 23, 1986. The submission stated:

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[3] Uniform School Law, ch. 492, § 47, 1986 Miss. Laws 687.

> This submission is cited as the 'Mississippi Uniform School Law of 1986' and is submitted to the Attorney General of the United States *in its entirety*. . . . For the sake of brevity, the submission will only set forth the particular sections which deal *primarily* with voting rights even though *the complete act is submitted for review.*

(See Appendix C to Appellants' Jurisdictional Statement, p. 35a.) (Emphasis added.) The cover memorandum stated the purpose of the Act as follows:

> The changes set forth in Senate Bill Number 2117 were made as part of a comprehensive reorganization and restructuring of the laws governing the administration and operation of the public schools of Mississippi. Further, the act grants to the governing boards of the school districts a measure of fiscal independence to meet the funding needs of each respective district. Mississippi schools currently operate under four different kinds of school district with each district having its own system of government and finance. It appears that if there were only one type of district so that all laws pertaining to districts would apply to each district in the state, rather than special laws for special types of districts, the administration and operation of school districts would be more effective and beneficial to the state.

(See Appendix C to Appellants' Jurisdictional Statement, pp. 43a-44a.)

The cover memorandum also explained 13 sections of the Uniform School Law, including § 52, the replacement for Miss. Code Ann. § 37-7-611 which was repealed by § 47 of the Uniform School Law. Regarding § 52, the submission memorandum stated:

> Section 52 amended Section 37-7-103 . . . [and] sets forth that . . . the school board of any school district may abolish such existing district or reorganize, change or alter the boundaries of any such district. Additionally, a school board with the consent of the school board of the district involved may add to such school district any part of the school district adjoining same or may detach territory from such school district and annex same to an adjoining district. The present law enables the county board of education to create, alter or abolish any school districts of such county, other than the municipal separate school districts. In addition, the county board of education with the consent of the board of trustees of the municipal separate school district involved may add to such municipal separate school districts any part of the county adjoining same or may detach territory from such municipal separate school district and annex same to an adjoining district in the county school system.

(See Appendix C to Appellants' Jurisdictional Statement, p. 37a.)

Along with the submission and cover memorandum, the State included a large loose-leaf notebook which was entitled "Senate Bill 2117 – Comparison of Current Law and New Law." It compared each section of the Act with prior law. The booklet's introduction stated:

> This booklet sets forth on a section by section basis each section of the current law which has been amended followed by each individual section of Senate Bill Number 2117, Laws of Mississippi, 1986 Regular Session. Where the sections of Senate Bill Number 2117 are new law then only those particular sections will be denoted with no comparison of current law. This

> section by section comparison provides explanatory materials adequate to disclose the difference between the prior and the proposed law. Each section of Senate Bill Number 2117 which is the version of the bill as sent to the governor is marked to show the changes made in the current law. Underlining indicates language added and a check mark indicates language deleted. By comparing each section of Senate Bill Number 2117 and the current practice, the changes to current law are easily identified.

(See Appendix D to Appellants' Jurisdictional Statement, p. 47a.) The loose-leaf booklet noted that § 47 of the Act provided for the repeal of § 37-7-611 as well as 22 other sections "which provide for the creation and operation of municipal separate school districts." (See Appendix D to Appellants' Jurisdictional Statement, p. 75a.) The regulations in effect at the time did not require that a copy of the repealed law be provided with the submission. 28 C.F.R. § 51.25 (1986).[4] In addition, the regulations in effect at the time provided that "[i]f a submission does not satisfy the requirements of § 51.25, the Attorney General *shall* request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice." 28 C.F.R. § 51.35 (1986) (emphasis added).[5]

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[4] The regulations have since been changed to require the State to submit a copy of the prior law being amended or repealed. *See* 28 C.F.R. § 51.27 (1990).

[5] The regulations have since been changed to provide that the Attorney General "may" request additional information. *See* 28 C.F.R. § 51.37.

On August 29, 1986, the USAG informed the Mississippi Attorney General [hereinafter referred to as "MAG"] that he did "not interpose any objection to the voting changes occasioned by Senate Bill No. 2117 (1986), as identified in your July 22, 1986, letter." (See Appendix F to Appellants' Jurisdictional Statement, p. 110a.) The USAG did not request any additional information regarding Senate Bill No. 2117, nor did he state any objection to any provisions of the bill during the 60 days within which he was allowed to do so by § 5 of the Voting Rights Act and the applicable federal regulations.[6]

Because of confusion regarding the language used by the USAG in its preclearance of Senate Bill No. 2117, the MAG sought an affirmative preclearance of § 47 (the repealer of § 37-7-611) on December 30, 1987. In its submission, the State stated that it "hereby expressly reserves and does not waive any and all objections it may have concerning whether the instant submission is subject to the preclearance requirements of § 5." (See Appendix G to Appellants' Jurisdictional Statement, pp. 112a, 114a.) On February 28, 1988, the USAG requested additional information concerning the repeal of § 37-7-611 (see Appendix H to Appellants' Jurisdictional Statement, p. 123a) and, after the State responded several months

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[6] The regulation governing computation of time, 28 C.F.R. § 51.8 (1986), provided that the 60-day period within which the USAG could interpose an objection would begin running upon receipt of the submission by the Department of Justice. According to the regulation's method of computation, the USAG's opportunity to object to the repeal of § 37-7-611 ended as of September 22, 1986. This regulation is currently codified at 28 C.F.R. § 51.9, and contains identical language.

later, the USAG interposed an objection to the repealer of § 37-7-611 for the first time on March 31, 1989. (See Appendix J to Appellants' Jurisdictional Statement, pp. 137a-140a.) The State requested reconsideration on January 12, 1990, and the USAG affirmed its objection on May 25, 1990. (See Appendices K and L to Appellants' Jurisdictional Statement, pp. 141a and 171a.)

The Appellants in this appeal subsequently filed suit in the United States District Court for the Southern District of Mississippi to enjoin enforcement of the 1977 and 1978 amendments to Miss. Code Ann. § 21-1-59 and the 1986 repealer of Miss. Code Ann. § 37-7-611, claiming that none of the three enactments had been properly precleared under § 5 of the Voting Rights Act. The three-judge court below granted summary judgment to plaintiffs on their claims that the 1977 and 1978 amendments to § 21-1-59 were not precleared and were not enforceable.[7] However, the lower court awarded summary judgment to defendants and intervenors on the plaintiffs'

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[7] The 1977 amendment to § 21-1-59 was not specifically submitted to the USAG for preclearance until March 23, 1990. The 1978 amendment to § 21-1-59 was submitted for preclearance in April 1978. The plaintiffs claimed before the lower court that the 1978 submission only referred to the referendum provisions and did not identify the voting changes in question, thereby failing to submit those changes for preclearance. In March 1981, the USAG notified the MAG that it interposed no objection to the 1978 submission.

On May 25, 1990, the USAG noted an objection to the 1977 amendment of § 21-1-59 and also notified the MAG that the portion of the 1978 amendment dealing with the extension of

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claim that the repealer of § 37-7-611 had not been precleared and was not enforceable. That ruling was based on the court's finding that § 47 of the Act had been submitted for preclearance in July 1986 and was precleared when the USAG failed to interpose an objection or request additional information within 60 days. The plaintiffs have appealed the ruling with regard to the repealer of § 37-7-611 to this Court.

ARGUMENT

A. The impact of this case on other Voting Rights Act cases will not be significant, since this case involves the review of very specific facts unique to this case and the regulations controlling this case have since been changed.

This case's impact on other Voting Rights Act cases will be so insignificant that no further review is warranted. The district court did not find that the enactments

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school districts further into neighboring counties had not been precleared. (See Appendix L to Appellants' Jurisdictional Statement, pp. 171a-175a.) The three-judge court granted summary judgment to plaintiffs on their claims that the 1977 and 1978 amendments to § 21-1-59 had not been precleared and were, therefore, unenforceable. That ruling has not been appealed and is not before this Court.

The effect of the lower court's ruling with regard to the 1977 and 1978 amendments to § 21-1-59 was insignificant, since the court found that the repealer of § 37-7-611 had been properly precleared and was enforceable. Likewise, all parties agree that § 52 of the Act (providing, like the 1977 and 1978 amendments to § 21-1-59, for the movement of school district lines only by consent of the districts involved) was precleared.

in question were not subject to § 5 – a finding which might have had an impact on the broad scope to be given § 5 – but, the finding was instead based on a review of very specific and technical facts with regard to the State's submission for preclearance of the Uniform School Law and the USAG's response to that submission. The facts are so unique to this case that the decision of the lower court will have no widespread application to Voting Rights Act cases nationwide. The district court's decision was based on the simple fact that the USAG failed to object to provisions which were submitted when the Uniform School Law was submitted for preclearance "in its entirety."

In addition, the regulations which ruled the State's submission in 1986 are no longer in effect. In 1986, 28 C.F.R. § 51.25 (1986) did not require the State to submit a copy of the prior law being amended or repealed. Because of this fact, the district court's holding will have very little impact on contemporary submissions being made to the USAG, since the current regulation, codified at 28 C.F.R. § 51.27 (1990), does require the State to submit a copy of the prior law being amended or repealed – a fact which no doubt does much to clarify any alleged ambiguities surrounding submissions today. Likewise, the regulations in effect in 1986 (28 C.F.R. § 51.35 (1986)) stated that the Attorney General "shall" request further information if it appears that a submission does not satisfy the requirements of § 51.25. This the USAG did not do in the instant case. The current regulation, codified at 28 C.F.R. § 51.37, states that the Attorney General "may" request such additional information.

B. The ruling of the district court was correct.

The ruling of the three-judge court now being appealed is simple and straightforward. The district court rejected the Appellees' arguments that the provisions in question did not effect voting and were, therefore, not subject to preclearance under § 5. The district court also rejected the Appellees' arguments that the 1977 and 1978 amendments to Miss. Code Ann. § 21-1-59 had been precleared. That rejection was based on the court's finding that the 1977 amendment was not precleared by virtue of the later preclearance of the 1978 amendment, as well as the court's finding that only the referendum provisions of the 1978 amendment, and not the voting changes in question, had been submitted for preclearance. (See Appendix A to Appellants' Jurisdictional Statement, p. 27a.) However, the district court correctly applied the applicable law and found that the Uniform School Law had been submitted to the USAG for preclearance "in its entirety" and that the USAG, having failed to object to any provisions thereof or to request additional information within 60 days, had precleared the entire Act, including the repealer of Miss. Code Ann. § 37-7-611.

The district court's ruling is supported by this Court's decision in *Morris v. Gressette*, 432 U.S. 491 (1977). In *Morris*, this Court invalidated a *nunc pro tunc* objection by the USAG to a reapportionment plan for the South Carolina Senate, holding that "compliance with § 5 is measured solely by the *absence*, for whatever reason, of a timely objection on the part of the Attorney General." *Id.* at 502. The Court held that a covered jurisdiction has complied with § 5 once it has filed a complete submission

with the USAG and has received no objection from the USAG within 60 days. It noted that compliance was "not conditioned on an affirmative statement by the Attorney General that the change is without discriminatory purpose or affect." *Id.* The Court then went on to state:

> In light of the potential severity of the § 5 remedy, the statutory language, and the legislative history, we think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: the extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be no 'dragging out' of the extraordinary federal remedy beyond the period specified in the statute. [Citation omitted] *Since judicial review of the Attorney General's actions would unavoidably extend this period, it is necessarily precluded.* [Footnote omitted].

Id. at 504-505 (emphasis added). The Court noted that where discriminatory impact of a statute is not detected by the USAG, it can be challenged in subsequent traditional constitutional litigation, "[b]ut it cannot be questioned in a suit seeking judicial review of the Attorney General's exercise of discretion under Section 5, *or his failure to object within the statutory period.*" *Id.* at 507 (emphasis added).[8]

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[8] In addition to the availability of traditional constitutional litigation, other safeguards are available to check potential discrimination with regard to the enactments in question in

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The district court in the instant case had an obligation to determine the circumstances surrounding the USAG's objection to the repealer of § 37-7-611 and to consider the timeliness and validity of that objection. In *Garcia v. Uvalde County*, 455 F. Supp. 101 (W.D. Tex. 1978), *aff'd*, 439 U.S. 1059 (1979), that court stated:

> Private Plaintiffs and the United States contend that we need only note that the Attorney General has entered an objection to the reapportionment and on that basis grant them the declaratory injunctive relief they seek. Given the facts surrounding the issuance of the objection letter in this case, the issue is not as simple as Plaintiffs would have it. Coming to court 'armed' with an objection letter does not necessarily entitle Plaintiffs to the relief they seek. *Morris v. Gressette*, 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977). *This court can review the circumstances in which the objection letter was issued in order to determine whether it was validly and timely issued. Morris v. Gressette, supra; Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973). An extensive review of the facts is appropriate.

455 F. Supp. at 102 (emphasis added). The district court, having found that the State made a complete submission of the entire Uniform School Law and that the USAG had

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the instant case. Any municipal annexation in Mississippi, the event which previously triggered § 37-7-611 and is now effected by its repealer, must be precleared by the USAG to determine not only the annexation's impact on voting in matters regarding schools, but the impact on voting in all other matters as well.

not objected or requested additional information within 60 days, was eminently correct in finding that the repealer of § 37-7-611 was precleared. Furthermore, under *Morris, supra,* that preclearance pursuant to the USAG's failure to object is unreviewable. The subsequent, untimely objection by the USAG to the repealer of § 37-7-611 was correctly found to be ineffective.

The Appellants contend that the district court's ruling was incorrect in that it failed to find that the State's submission of the Uniform School Law was incomplete or ambiguous. This argument is misplaced. In *McCain v. Lybrand,* 465 U.S. 236 (1984), the Court stated, "when a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to Section 5 constitutes a submission of the changes made by the enactment . . . . " *Id.* at 256. Likewise, it is the *scope* of the preclearance request that must not be ambiguous under *McCain, supra.* In *McCain,* the Court stated that *"[t]o the extent there was any ambiguity in the scope of the preclearance request,* the structure and purpose of the preclearance requirement plainly counsel against resolving such ambiguities in favor of the submitting jurisdiction in the circumstances of this case." *Id.* at 257.

The *scope* of the State's submission request in the instant case could not have been more unambiguous. The submission stated that the Uniform School Law was being submitted "in its entirety." The submission also stated, "for the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though *the complete act is submitted for*

review." (See Appendix C to Appellants' Jurisdictional Statement, p. 35a.) If the USAG was under the impression that only the 13 sections discussed in the cover memorandum were being submitted for preclearance – and not all other provisions of the Act as discussed in the loose-leaf notebook which was submitted – then that misapprehension is based on the USAG's disregard for the scope of the submission as clearly stated by the MAG.

Not only was the scope of the submission unambiguous, but the State clearly identified any voting changes involved in this appeal. Section 52 of the Act, which replaced § 37-7-611 and established the single method by which school district boundaries could be altered, was discussed thoroughly in both the cover memorandum and the loose-leaf notebook. (See Appendices C and D to Appellants' Jurisdictional Statement, pp. 37a and 76a-77a.) Likewise, the fact that § 37-7-611, as well as 22 other statutes dealing with the "creation and operation of municipal separate school districts," was being repealed was also addressed in the loose-leaf notebook. (See Appendix D to Appellants' Jurisdictional Statement, p. 75a.) Nothing was being hidden. The USAG did not object to any of the provisions, nor did he request additional information regarding any of the provisions. If the USAG was under the mistaken impression that the voting changes in question were not being submitted for preclearance, then it was because of his disregard of information clearly set forth in the submission which caused that misunderstanding and not any attempt by the State "to circumvent the protections afforded by the Act." *McCain*, 465 U.S. at 257.

Decisions by other three-judge courts also support the district court's ruling in the instant case. In *Woods v. Hamilton*, 473 F. Supp. 641 (D.S.C. 1979), the court considered a South Carolina Home Rule Act which authorized the holding of referendums by counties to determine a form of government, transferred substantial powers to the counties and mandated the assumption (either by choice or inaction) of particular forms of government by counties. *Id.* at 644-645. In submitting the Act to the USAG for preclearance, the South Carolina Attorney General's office forwarded a cover letter quoted in full as follows:

> For your consideration under the Voting Rights Act submitted herewith are certified copies of the following Act enacted by the General Assembly and approved by the Governor.
>
> | Ratification Number | Date Approved |
> |---|---|
> | R396 | June 25, 1978 |
>
> We would request expeditious consideration of this Act. If additional information is needed, please contact me.

Id. at 644. The court found that "[i]t is apparent from the above letter that the State submitted the *entire* Home Rule Act to the United States Attorney General for his consideration within the 60-day statutory period." *Id.* at 644. In responding to the State's submission, the USAG expressly failed to object to the holding of a referendum, "attempted to reserve the right to object to the implementation in the counties of the several forms of government" and "made no mention of the transfer of powers." *Id.* at 645. The three-judge court in *Woods* relied on *Morris v. Gressette, supra,* and found that the USAG's failure to

object to any part of the Act was tantamount to approval and that the entire act was precleared. *Id.* In *Woods*, the fact that the South Carolina Attorney General submitted "this Act" was deemed sufficient to put the USAG on notice that the entire act was being submitted for preclearance. In the instant case, the scope of the MAG's submission is even more unambiguous, since it stated that the Act was being submitted "in its entirety" and that "the complete Act is submitted for review."

The cases cited by Appellants in their Jurisdictional Statement as support for their position that the submission was ambiguous are inapposite to the instant case. For example, in *McCain v. Lybrand*, 465 U.S. 236 (1984), the Court found that preclearance of a submitted enactment did not serve as preclearance of prior amendments to the enactment which were independently subject to preclearance themselves but had never been submitted. That is not the situation with regard to the repealer of § 37-7-611, which was clearly submitted to the USAG as part of the Uniform School Law. The Appellees are not contending, and the district court did not hold, that a prior amendment could be precleared pursuant to the submission of a later amendment to the enactment in question.[9]

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[9] In fact, the district court applied *McCain, supra*, in finding that the 1977 amendment to Miss. Code Ann. § 21-1-59 was not precleared by virtue of the preclearance of the later 1978 amendment.

Likewise, in *Clark v. Roemer*, 59 U.S.L.W. 4583 (U.S. June 3, 1991), the Court considered the validity of enactments which had either never been submitted for preclearance or had been submitted, but were objected to in a timely manner by the USAG. The Court stated the issues in that appeal as follows:

> The case presents two discrete issues under § 5 of the Voting Rights Act. First, we must decide whether the District Court erred by not enjoining elections held for judgeships to which the Attorney General interposed valid § 5 objections. Second, we must determine whether the State's failure to preclear certain earlier voting changes under § 5 was cured by the Attorney General's preclearance of later, or related, voting changes.

59 U.S.L.W. at 4584. The Court in that case correctly held that the elections for judgeships to which timely objections had been interposed, as well as the earlier voting changes which had never themselves been submitted for preclearance, were unenforceable under *McCain, supra.* Again, these findings have no relevance to the instant case in which the changes in question were clearly submitted for preclearance.

Finally, in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Court considered the preclearance status of state enactments which again had never been formally submitted to the USAG for preclearance. In that case, the Court rejected arguments that the enactments had been "submitted" for purposes of § 5 when the USAG merely became aware of them through service of legal briefs in several consolidated cases. The Court correctly held that

no submission had taken place, but that holding has no application to the case now before the Court.

The Appellants' argument that statements made by the MAG demonstrate that the State knew § 47 had not been precleared is equally irrelevant. A state's opinion regarding the preclearance status of an enactment is not determinative, and it is illogical to argue that a state can effect the preclearance status of an enactment merely by stating its opinion as to what that status is. If such were the case, then § 5 would be unenforceable. Nor has the fact that a state continued seeking preclearance for an enactment beyond the USAG's deadline for objection prevented courts from finding the enactment precleared. *See, e.g., Garcia v. Uvalde County, supra.* Finally, in resubmitting § 47 for preclearance, the State reserved the right to challenge the necessity of preclearance.

In the instant case, the district court also considered the decision of the Mississippi Supreme Court in *Greenville Public School District v. Western Line Consolidated School District*, 575 So. 2d 956 (Miss. 1990), in which the Mississippi Supreme Court considered the identical issue of whether the repealer of § 37-7-611 had been precleared by the USAG.[10] In that case, the Mississippi Supreme Court found that the USAG had precleared the repealer of § 37-7-611 when it failed to state an objection within the 60-day period. The Mississippi Supreme Court also found that, even if the repealer of § 37-7-611 had not been precleared, that statute would have been repealed by

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[10] *Greenville Public School District, supra,* is currently before the United States Supreme Court on petition for a Writ of *Certiorari*, Cause No. 90-1861.

implication with the passage of its replacement, the amended § 37-7-103, which everyone agrees was precleared. A finding that the repealer of § 37-7-611 was not precleared would leave two completely inconsistent statutes in effect. Section 37-7-611 allows for a municipal school district to take over any territories annexed by the municipality, while § 37-7-103 requires consent of the school districts involved before any school district boundaries may be changed. The Mississippi Supreme Court found that, if such were the case, then § 37-7-103, which was precleared, would clearly be deemed to have repealed the prior statute, § 37-7-611, by implication. 575 So. 2d at 963.

In considering the Mississippi Supreme Court's decision in *Greenville Public School District, supra,* the district court agreed that the Mississippi Supreme Court "has concurrent jurisdiction to adjudicate certain § 5 issues. *Tafflin v. Levitt,* ___ U.S. ___, 110 S.Ct. 792 (1990)." (Appendix A to Appellants' Jurisdictional Statement, p. 14a.) However, the district court noted that it was "not bound by state court decisions on matters of federal law. *See, e.g., Standard Oil Co. v. Johnson,* 316 U.S. 481, 483 (1942); *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 470-71 (1942) (Jackson, J., concurring)." (Appendix A to Appellants' Jurisdictional Statement, p. 15a.) The district court, like the Mississippi Supreme Court, found that the 1986 repealer of § 37-7-611 had been precleared, not because it was bound by the Mississippi Supreme Court's decision, but because it agreed with it. Having decided the case on the federal question of preclearance, it was not necessary for the district court to consider the Mississippi Supreme Court's decision regarding the repeal by

implication of § 37-7-611. The district court noted, "Because we find that the submission was complete, we need not decide whether § 37-7-611 was precleared by implication, due to the undisputed preclearance of § 37-7-103." (Appendix A to Appellants' Jurisdictional Statement, p. 27a n.7.) However, the district court did note that:

> [A] state supreme court's interpretation of a state statute is binding on a federal court. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the State's highest court with respect to state law are binding on the federal courts"); *Brown v. Ohio*, 432 U.S. 161, 167 (1977) ("Ohio courts 'have the final authority to interpret . . . that State's legislation.' ") (quotation omitted). Accordingly, the Mississippi Supreme Court's interpretation of the Uniform School Law is binding on this court.

(Appendix A to Appellants' Jurisdictional Statement, pp. 15a-16a.)

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or, alternatively, the decision of the district court should be affirmed.

Respectfully submitted,

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